

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Nagravision USA)	CSR-8190-Z
)	
Request for Waiver of Section 76.1204(a)(1) of)	
the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2009

Released: October 2, 2009

By the Chief, Media Bureau:

I. INTRODUCTION

1. Nagravision USA (“Nagravision” or “Petitioner”) has filed a request for waiver (the “Waiver Request”) of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission’s rules.¹ Nagravision seeks waiver pursuant to the Commission’s decision in the *Evolution Order*,² in which the Commission adopted a streamlined process for waiver of the integration ban for one-way, low-cost, limited-capability set-top boxes. Pursuant to the *Evolution Order* precedent, we grant Nagravision’s request for waiver of Section 76.1204(a)(1) of the Commission’s rules.

II. BACKGROUND

A. Section 629 of the Act

2. Congress directed the Commission to adopt regulations to assure the commercial availability of navigation devices more than ten years ago as part of the Telecommunications Act of 1996.³ The Commission implemented this directive in 1998 through the adoption of the “integration ban,” which established a date after which cable operators no longer may place into service new navigation devices (*e.g.*, set-top boxes) that perform both conditional access and other functions in a

¹ 47 C.F.R. § 76.1204(a)(1). The separation of the security element from the host device required by this rule is referred to as the “integration ban.”

² *Evolution Broadband, LLC’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 24 FCC Rcd 7890 (2009) (“*Evolution Order*”).

³ See Section 629(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 549(a) (requiring the FCC “to adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor”); see also Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56, 125-126 (1996).

single integrated device.⁴ Originally, the Commission established January 1, 2005 as the deadline for compliance with the integration ban.⁵ On two occasions, the National Cable and Telecommunications Association (“NCTA”), on behalf of all cable operators, sought – and obtained – extensions of that deadline.⁶ The Commission ultimately fixed July 1, 2007 as the deadline for compliance with the integration ban.⁷

3. The purpose of the integration ban is to assure reliance by both cable operators and consumer electronics manufacturers on a common separated security solution.⁸ This “common reliance” is necessary to achieve the broader goal of Section 629 – *i.e.*, to allow consumers the option of purchasing navigation devices from sources other than their MVPD.⁹ Although the cable industry has challenged the lawfulness of the integration ban on three separate occasions, in each of those cases the D.C. Circuit denied those petitions.¹⁰ In limited circumstances, however, operators may be eligible for waiver of the integration ban.¹¹

4. In the *Evolution Order*,¹² the Commission granted waiver of its rule that prohibits multichannel video programming distributors from “plac[ing] into service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device”¹³

⁴ See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14803, ¶ 69 (1998) (“*First Report and Order*”) (adopting Section 76.1204 of the Commission’s rules, subsection (a)(1) of which (1) required multichannel video programming distributors (“MVPDs”) to make available by July 1, 2000 a security element separate from the basic navigation device (*i.e.*, the CableCARD), and, in its original form, (2) prohibited MVPDs covered by this subsection from “plac[ing] in service new navigation devices ... that perform both conditional access and other functions in a single integrated device” after January 1, 2005); see also 47 C.F.R. § 76.1204(a)(1) (1998).

⁵ *First Report and Order*, 13 FCC Rcd at 14803, ¶ 69.

⁶ In April 2003, the Commission extended the effective date of the integration ban until July 1, 2006. See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003) (“*Extension Order*”). Then, in 2005, the Commission further extended that date until July 1, 2007. See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6810, ¶ 31 (“*2005 Deferral Order*”).

⁷ *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

⁸ See *Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 220, 226, ¶ 19 (2007) (citing the *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 30) (explaining why the Commission “require[d] MVPDs and consumer electronics manufacturers to rely upon identical separated security with regard to hardware-based conditional access solutions”).

⁹ See S. REP. 104-230, at 181 (1996) (Conf. Rep.). See also *Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (MB 2004). As the Bureau noted, Congress characterized the transition to competition in navigation devices as an important goal, stating that “[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality.”

¹⁰ *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008); *Charter Comm., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000). The Commission argued, and the D.C. Circuit agreed, that the integration ban was a reasonable means to meet Section 629’s directive. *Charter Comm., Inc. v. FCC*, 460 F.3d 31, 41 (D.C. Cir. 2006) (“this court is bound to defer to the FCC’s predictive judgment that, ‘[a]bsent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation.’”).

¹¹ 47 U.S.C § 549(c); *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

¹² *Id.* at ¶¶ 11-14.

¹³ 47 C.F.R. § 76.1204(a)(1).

with respect to two set-top boxes manufactured by Evolution Broadband, LLC. The Commission granted waiver based in part on the “low-cost, limited capability” standard articulated in the *2005 Deferral Order*.¹⁴ The Commission concluded that such devices will serve the public interest by furthering cable operators’ migrations to all-digital networks (thereby increasing service offerings) and would not jeopardize the development of the competitive marketplace for navigation devices that Section 629 of the Communications Act directed the Commission to promote.¹⁵ In the interest of competitive fairness, the Commission created a streamlined waiver process for manufacturers of similarly low-cost, limited-capability set-top boxes.¹⁶

B. The Waiver Requests

5. On July 13, 2009, Petitioner filed its request for waiver of Section 76.1204(a)(1) of the Commission’s rules with respect to certain “low cost, limited capability” set-top boxes (“Subject Boxes”)¹⁷ pursuant to the streamlined waiver process set forth in the Commission’s decision in the *Evolution Order*. Chuck Higgins, Vice President, Set-top Box Engineering Americas for Nagravision certified under penalty of perjury that the Subject Boxes are no more advanced than the devices for which the Commission granted waiver in the *Evolution Order*.¹⁸ The Bureau released a public notice seeking comment on the Waiver Request on July 28, 2009.¹⁹ Public Knowledge filed comments in response to the Waiver Request,²⁰ and Petitioner filed an ex parte letter clarifying certain parts of its Waiver Request.²¹

6. In the public notice seeking comment on the Waiver Request, the Bureau expressly directed commenters to limit their comments to the issue of whether the devices for which Petitioner seeks waiver are more advanced than the Evolution Broadband DMS-1002 and DMS-1002-CA, and declared that “[t]he Bureau does not seek comment on the policy implications of issues resolved in the *Evolution Order*.”²² Nonetheless, Public Knowledge filed comments that addressed only the policy implications of issues that were discussed and resolved in the *Evolution Order*.²³ As a result, we do not address their arguments. No other comments were filed.

¹⁴ See *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

¹⁵ *Evolution Order*, 24 FCC Rcd at 7895-6, ¶¶ 12-13.

¹⁶ *Id.* at 7897, ¶ 15.

¹⁷ The Subject Boxes are the Nagravision AC-N060PD2A-SC and AC-N060PD2A-SIM.

¹⁸ Waiver Request, attaching Declaration of Chuck Higgins.

¹⁹ *Media Bureau Seeks Comment on Nagravision's Low-Cost, Limited Capability Set-Top Box Certification*, 24 FCC Rcd 9444 (MB 2009) (“*Nagravision PN*”).

²⁰ See Public Knowledge Comments (filed August 7, 2009).

²¹ Letter from Edward R. Grauch, Senior Vice President, Nagravision Consumer Electronics Business Unit, to Marlene H. Dortch, Secretary, Federal Communications Commission (August 3, 2009) (“*Nagravision Ex Parte*”).

²² *Nagravision PN*, 24 FCC Rcd at 9445, n.6.

²³ Public Knowledge Comments at 1-4; *Evolution Order*, 24 FCC Rcd at 7893-7, ¶¶ 8-16.

III. DISCUSSION

7. As explained above, in the *Evolution Order* the Commission adopted a streamlined process for low-cost, limited-capability set-top box waiver requests. Specifically, the Commission stated that

[i]f applicants certify that the capabilities of their navigation devices are low-cost, limited capability devices that are no more advanced than the [Evolution DMS-1002 and DMS-1002-CA] and include the full specifications of any devices for which waiver is sought, the Media Bureau will release a public notice seeking comment on those certifications for a period of ten calendar days, after which the Bureau will expeditiously grant a waiver similar to the one granted herein, deny such a waiver, or take other appropriate action.²⁴

Petitioner submitted a certification that the Subject Boxes are no more advanced than the Evolution DMS-1002 and DMS-1002-CA devices. We conclude, based on our review of the specifications of the devices²⁵ and the supplemental filing from NagraVision²⁶ that the Subject Boxes are no more advanced than the Evolution DMS-1002 and DMS-1002-CA devices. As NagraVision explains in its ex parte letter, the Subject Boxes do not have the hardware necessary to support return-path communications, high definition output, hard drive expansion for DVR service, cable modem support, or multiple tuners.²⁷ Accordingly, we find that the Subject Boxes are no more advanced than the Evolution DMS-1002 and DMS-1002-CA, and good cause for waiver exists for the same reasons provided in the *Evolution Order* and the *2005 Deferral Order*.²⁸

8. While it is conceivable that significant hardware modifications could alter the capabilities of the Subject Boxes, the Bureau has clarified that such a modification would effectively make the Subject Boxes different devices, and this waiver only applies to the devices at issue; namely, the one-way, non-HD, non-DVR devices specified in the Waiver Request.²⁹ As the Bureau has explained, devices with different capabilities would require separate waivers.³⁰

9. As the Commission declared in the *Evolution Order*, cable operators may deploy the Subject Boxes on any system without need for a further waiver of Section 76.1204(a)(1)'s prohibition on the deployment of navigation devices "that perform both conditional access and other functions in a single integrated device."³¹ Operators must follow the other requirements of Section 76.1204(a)(1); namely "operators that choose to deploy the Subject Boxes are not afforded a waiver of the requirement

²⁴ *Evolution Order*, 24 FCC Rcd at 7897, ¶ 15.

²⁵ Waiver Request at Exhibit A & B.

²⁶ *NagraVision Ex Parte* at 2-3.

²⁷ *Id.* See also Waiver Request at 2.

²⁸ *Evolution Order*, 24 FCC Rcd at 7894-7, ¶ 11-14; *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

²⁹ *Motorola, Inc. et al. Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, DA 09-1854, ¶ 9 (rel. Aug 24, 2009).

³⁰ See, e.g., Cisco Reply at 2 ("These more advanced capabilities could only be supported in a very different type of device, which would entail the filing of a different waiver request. The Petition that Cisco filed would not authorize the DTAs to include such capabilities.").

³¹ *Evolution Order*, 24 FCC Rcd at 7897, ¶ 15, n.43 (citing 47 C.F.R. § 76.1204(a)(1)).

that they ‘make available equipment that incorporates only the conditional access functions of such devices.’”³² In other words, cable operators must offer CableCARDS to their subscribers.

IV. CONCLUSION

10. For the reasons stated above, we conclude that the Subject Boxes are eligible for waiver under the “low-cost, limited capability” standard articulated in the *2005 Deferral Order* as applied in the *Evolution Order* because the Subject Boxes are only capable of doing what is necessary to make digital cable programming viewable on analog television sets. For this reason we conclude that, with respect to the Subject Boxes, Petitioner has justified a three-year waiver of the integration ban under the standard set forth in the *2005 Deferral Order*, the *Evolution Order*, and Sections 1.3 and 76.7 of the Commission’s rules. Accordingly, we grant the Waiver Request, and, until three years from the release of this order, any cable operator may choose to deploy the Subject Boxes without requesting a waiver of Section 76.1204(a)(1)’s prohibition on the deployment of navigation devices “that perform both conditional access and other functions in a single integrated device.”³³

V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission’s rules, 47 C.F.R. §§ 1.3, 76.7, the request for waiver of Section 76.1204(a)(1) of the Commission’s rules, 47 C.F.R. § 76.1204(a)(1), filed by NagraVision USA **IS GRANTED** to the extent described above.

12. This action is taken pursuant to authority delegated by Section 0.283 of the Commission’s rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

³² *Id.*

³³ Our plug-and-play rules apply to cable operators, and we remind cable operators who deploy the Subject Boxes that they ultimately are responsible for compliance with our rules (*e.g.*, making available and supporting CableCARDS; using CableCARDS in all devices except for the Subject Boxes; complying with 76.640 of the Commission’s rules; etc.). *See, e.g., Pace Micro Technology PLC*, 19 FCC Rcd 1945, 1947 (MB 2004) (reminding cable operators that despite an equipment-related waiver granted to an equipment manufacturer, cable operators are ultimately responsible for compliance with our rules).